Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	
Petition for a Declaratory Ruling Regarding the	)	
Just and Reasonable Nature of, and State Law	)	DA 97-2464
Challenges to, Rates Charged by CMRS Providers	)	
When Charging for Incoming Calls and Charging	)	
for Calls in Whole-Minute Increments	)	

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its affiliated telecommunications companies ("GTE") hereby submit their comments in support of the Petition for Declaratory Ruling (*"Petition"*) filed by Southwestern Bell Mobile Systems ("SBMS").[1] For the reasons set forth below, the Commission should declare that: (1) the definition of the term "rates charged" in 47 U.S.C. § 332(c)(3) includes the services for which and how much a commercial mobile radio service ("CMRS") provider may charge; (2) challenges to the "rates charged" by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law; and (3) claims brought under state law that directly or indirectly challenge the "rates charged" by a CMRS provider are preempted by Section 332(c)(3).

---

[1] Public Notice, *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, DA 97-2464 (rel. Nov. 24, 1997).

I. INTRODUCTION AND SUMMARY

GTE urges the Commission to grant the relief requested by SBMS in an expeditious manner. As the *Petition* points out, numerous state lawsuits have been filed challenging the rates that CMRS providers charge for cellular service on a per-minute basis. As demonstrated herein, such state court decisions constitute impermissible state rate regulation of commercial mobile radio services contrary to Section 332(c)(3) of the Communications Act.

In 1993, Congress amended the Communications Act of 1934 to preempt all state rate and entry regulation of commercial mobile radio services.[2] As the Commission has recognized, Congress amended the Communications Act for the express purpose of establishing a uniform federal regulatory policy for cellular service, "not a policy that is balkanized state-by-state."[3]

Since 1993, plaintiffs' attorneys have filed at least 20 class action suits in states courts -- including Alabama, California, and Texas -- seeking to recover damages against service providers charging for cellular service on a per-minute basis. These cases, many of which have common counsel, typically allege fraud and breach of contract and seek consequential damages based on the difference between the amount subscribers actually paid for their cellular service and the (allegedly lesser) amount they would have paid but for the per-minute charge. In substance, these cases all seek a retroactive cellular rate reduction. Consequently, they constitute direct challenges to CMRS providers' rates.

---

[2] *See* 47 U.S.C.A. § 332(c)(3)(A). The Act did authorize the FCC to permit states to petition to regulate rates and entry, but no state has succeeded with such a petition.

[3] *Petition of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, at ¶ 24 (1995).

The state courts have not been consistent in resolving these cases. For example, *Lee v. Contel Cellular of the South, Inc.*, demonstrates the difficulty courts have had in resolving the preemption issue.[4] There, the court held the plaintiff's breach of contract claim was preempted by federal law.[5] But, the court also held that plaintiff's fraud cause of action -- which sought recovery for the same conduct -- was not preempted.[6] Other courts similarly have failed to recognize the state regulatory aspect of these class actions and have rejected defendants' preemption arguments. In *Bennett v. Alltel Mobile Communications of Alabama, Inc.*, the plaintiff contended that the defendant's practice of charging on a per-minute basis constituted fraud, misrepresentation, and breach of contract.[7] The court held that plaintiff's claims did not "relate to the rates charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims."[8] The court further found that plaintiffs' claims were preserved by the Communications Act's general savings clause,[9] which not only ignores the intent of both Congress and the FCC, but also interprets the Communications Act's savings clause in such a way that it swallows the Communications Act's express preemption provision.[10]

---

4 *Lee v. Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala. 1996).

5 *Id.* at *12-13.

6 *Id.* at *18-23.

7 *Bennett v. Alltel Mobile Communications of Alabama, Inc.*, Civil Action No. 96-D-232-N (M.D. Ala.) (entered May 14, 1996).

8 *Id.* at 6.

9 *Id.* at 11-12.

10 *Compare Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("[a] general 'remedies' saving[s] clause cannot be allowed to supersede the specific substantive pre-emption provision").

As these state court decisions begin to shape the contours of regulatory policy, CMRS providers will continue to risk inconsistent judgments while they attempt to build out their systems across state lines. Because of this unwieldy development in the various state courts, GTE respectfully submits that the Commission should act favorably on SBMS's *Petition*.

II. THE COMMUNICATIONS ACT EXPRESSLY PREEMPTS STATE REGULATION OF CELLULAR TELEPHONE RATES

Federal preemption is found in three circumstances: (i) Congress "can define explicitly the extent to which its enactments preempt state law;" (ii) "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively;" and (iii) "state law is pre-empted to the extent it actually conflicts with federal law."[11] Preemption is "fundamentally . . . a question of congressional intent."[12] Based on *Cippollone* and other Supreme Court precedent, Congress has unequivocally expressed its intent to preempt all state regulation of cellular service rates.

In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993,[13] which, in pertinent part, amended the Communications Act to expressly preempt all state rate and entry regulation of cellular service:

---

[11] *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

[12] *Id.; see also Cippillone v. Liggett*, 505 U.S. 504, 517 (1992) ("[w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation") (internal citations omitted).

[13] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

> No state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . .[14]

By the unambiguous language of Section 332(c)(3)(A), Congress clearly and unequivocally expressed its intent to preempt all state regulatory authority over rates charged for cellular service.[15]

The Communications Act's other provisions further manifest Congress' goal of uniform federal regulation. Congress has expressly created a private federal right of action under the Communications Act, and has provided that the federal courts and the FCC shall have exclusive jurisdiction over such an action.[16] Section 201(b) of the Communications Act provides that "any charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[17] Section 207 provides for a private right of action for damages for any violation of Section 201(b) and provides that federal district courts and the FCC have exclusive jurisdiction over such claims. By means of the express preemption clause in Section 332 and the private right of action in Sections 201(b) and 207 of the Communications Act, Congress has clearly expressed its

---

[14] 47 U.S.C.A. § 332(c)(3)(A). The terms "commercial mobile service" and "commercial mobile radio service" ("CMRS") include "cellular service." *See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, at ¶¶ 27, 101 (1994) (Second Report and Order).

[15] *See In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, at ¶ 18 (1995) (Report and Order) ("the overarching command" of Section 332(c)(3)(A) "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance").

[16] *See* 47 U.S.C. §§ 201(b), 207.

[17] 47 U.S.C. § 201(b).

intent to preempt all forms of state regulation of rates charged by cellular service providers.

In light of Congress' express preemption of cellular rate regulation, there can be no reasonable dispute that state court regulation of cellular telephone service is preempted. The real question is whether the clear consequence of preemption can be avoided by mere subterfuge and artful pleading that labels a substantive request for a retroactive rate reduction as a claim for breach of contract or fraud. As shown below, they cannot.

III. STATE COURT AWARDS OF DAMAGES AND INJUNCTIVE RELIEF CONSTITUTES STATE REGULATION OF CELLULAR SERVICE RATES

It is well established that judicial action is a form of state action or state regulation that is indistinguishable from legislative or executive activity.[18] In *San Diego Building Trades Council v. Garmon,* the Supreme Court stated:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief.* The obligation to pay compensation can be, indeed, is designed to be, a potent method of governing conduct and controlling policy. Even the State's salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.[19]

---

[18] *See Shelley v. Kraemer,* 334 U.S. 1, 14 (1948) (judicial branch of state government may effect state action).

[19] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (emphasis added); *see also Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 578-79 (1981) (state court damage action over contract that had been approved by Federal Power Commission constituted impermissible attempt to obtain retroactive rate change).

State law challenges to per-minute billing represent direct challenges to the lawfulness and reasonableness of cellular service rates.[20] In *Lee v. Contel Cellular of the South, Inc.*, the court recognized this aspect of the plaintiff's state law claims:

> It is undisputed that the FCC has the exclusive authority to regulate current rates charged by cellular service providers. It necessarily follows, as argued by defendant, that a court cannot assess the use of the 'rounding' practice in calculating bills without deciding if the rates resulting from that practice are 'unreasonable' or 'unjust.' The court therefore concludes that the Communications Act preempts plaintiff's common law breach of contract claim.[21]

Similarly, in *In re Comcast Cellular Telecommunications Litigation*, the court held that the Communications Act preempts state law claims that challenge a service provider's practice of billing in per-minute increments and rounding up to the next full minute.[22] The *Comcast* Court explained that:

> [a]n examination of the Plaintiffs' complaint and the remedies that they seek demonstrates that the driving force behind their allegations is a desire to impose

---

[20] Further, if state courts are permitted to award damages and injunctive relief in per-minute billing cases, cellular service would be at risk for violating the antidiscrimination provisions of section 202 of the Communications Act. *See Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. 1996). In *Marcus*, the named plaintiffs sought class certification of their claims that AT&T had committed fraud and negligent misrepresentation by failing to disclose its practice of billing in per-minute increments and rounding up to the next full minute. The court dismissed the case, holding in part that it could not grant the requested relief without requiring AT&T to violate Section 202. *Marcus*, 938 F. Supp. at 1171.

[21] *Lee v. Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636, at *8-9 (S.D. Ala. 1996).

[22] *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996).

> restrictions not only upon the way in which Comcast advertises its rates but also upon the rates which Comcast may charge for mobile telephone services.[23]

As such, the court held that

> the Plaintiffs' claims present a direct challenge to the calculation of the rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular service provider], something it is explicitly prohibited from doing.[24]

The *Lee* and *Comcast* decisions are consistent with Congress' intent as expressed in the Act.[25]

IV. THE COMMISSION SHOULD CLARIFY THAT THE ACT'S SAVINGS CLAUSE DOES NOT SUPERSEDE CONGRESS' PREEMPTION PROVISION AND ALLOW DAMAGES RECOVERIES BASED ON CELLULAR SERVICE RATES

Plaintiffs in the state court cases throughout the country have attempted to use the Communications Act's savings clause, 47 U.S.C. § 414, to avoid the consequences of cellular rate preemption. Because this gambit has worked in some cases and has confused what should be a straightforward issue in other cases, the Commission should take the opportunity to clarify the savings clause issue.

---

23 *Id.* at 1201.

24 *Id.*

25 Indeed, a majority of courts have agreed with this interpretation of Section 332. *See In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996); *Ponder v. GTE Mobilnet*, 1996 U.S. Dist. LEXIS 19562 (S.D. Ala. 1996); *Lee v. Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala. 1996); *Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Department of Public Utility*, 1996 Conn. Super. LEXIS 3326 (1996); *Hardy v. Claircom Communications Group, Inc.*, 1997 Wash. App. LEXIS 849 (1997); *Simons v. GTE Mobilnet, Inc.*, Civil Action No. H-95-5169 (S.D. Tex. April 11, 1996).

The Communications Act's savings clause provides that: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[26] The savings clause preserves only those "[s]tate-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the [Communications] Act."[27]

The savings clause cannot apply to preserve state law claims that conflict with an express preemption provision of the Act and with its regulatory scheme. Such an interpretation of the savings clause would swallow the Act's preemption provision and undermine Congress' intent. In *Morales v. Trans World Airlines, Inc.*, the Supreme Court interpreted the relationship between the Airline Deregulation Act's preemption provision and its savings clause.[28] The Court held that: "[a] general 'remedies' saving[s] clause cannot be allowed to supersede the specific substantive pre-emption provision . . . ."[29] Accordingly, the Commission

---

[26] 47 U.S.C. § 414.

[27] *Kellerman v. MCI Telecomm. Corp.*, 493 N.E.2d 1045, 1051 (Ill.), *cert. denied*, 479 U.S. 949 (1986). *See also MCI v. Graphnet*, 881 F. Supp. 126, 131 (D.N.J. 1995) (quoting *Kellerman*); *Cellular Dynamics, Inc. v. MCI Telecomm. Corp.*, No. 94C3126, 1995 WL 221758, at *3 (N.D. Ill. Apr. 12, 1995) (the savings clause preserves only those state law "claims for breaches of independent duties that neither conflict with specific provisions of the [Communications] Act, nor interfere with its regulatory scheme"); *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah 1994) (quoting *Kellerman*).

[28] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

[29] *Id.; see also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause").

should clarify that the Act's savings clause does not preserve state-law causes of action that constitute a challenge to cellular service rates.

V. CONCLUSION

For the foregoing reasons, GTE respectfully submits that the Commission should grant the relief requested by SBMS's *Petition*. Absent clarification on the issues presented in the *Petition*, the clear jurisdictional boundary for CMRS regulation established by Congress may be eroded by state law challenges to CMRS rates. This result would contravene the plain meaning of Section 332(c)(3) and the clear Congressional policy that favors allowing market forces to determine CMRS rates.

Respectfully submitted,

GTE Service Corporation and its
affiliated telecommunications companies

By 

Andre J. Lachance
850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5276

Their Attorney

January 7, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1998, I caused copies of the foregoing Comments of GTE Service Corporation to be mailed via first-class postage prepaid mail to the following:

Yanic Thomas*
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, N.W., Seventh Floor
Washington, D.C. 20554

Carol M. Tacker
Vice President, General
Counsel & Secretary
SOUTHWESTERN BELL MOBILE
SYSTEMS, INC.
17330 Preston Road, Suite 100A
Dallas, TX 75252

Patrick J. Grant
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Marcus E. Cohn, P.C.
PEABODY & BROWN
101 Federal Street
Boston, MA 02110-1832

International Transcription Service, Inc.*
1231 20th Street, N.W.
Washington, D.C. 20036

Christy Wright

*Via Hand Delivery